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Supreme Court, U.S.
FILED

No 95-826 JUL 10 1995

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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1995

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SAM S. JENKINS SR.,

*Petitioner*

vs.

STATE OF NEW MEXICO SECURITIES DIVISION

*Respondent*

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**PETITION FOR WRIT OF CERTIORARI**

**TO THE UNITED STATES COURT OF APPEALS**

**FOR THE NEW MEXICO COURT OF APPEALS**

# PETITION FOR WRIT OF CERTIORARI

SAM S. JENKINS, SR.,
PRO SE APPELLANT
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ALBUQUERQUE, N.M. 87154
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September 12, 1995

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59 pp

## QUESTION PRESENTED

Was it selective prosecution and a violation of Appellants Constitutional rights under Title 42 for the New Mexico Securities Division to prosecute Appellant under this cause.

Was Appellants Constitutional rights as a pro-se litigant violated as a non-lawyer by the "dominant lawyer prosecution" in this case.

Was it error for the New Mexico Securities Division to prosecute appellant as a non-registered broker-dealer, when the act complained of was clearly an "Exempt Transaction" under N.M. Statutes 58-13B-27; "An Isolated non-issuer transaction is exempt, whether or not effected through a broker-dealer."

Was it error for the New Mexico Court of Appeals to deny Sam S. Jenkins, Sr., full appeal by the court rather than dismiss this cause on calendar notice when case law and State statutes supported Appellant's argument for appeal.

Was it error for the Supreme Court of the State Of New Mexico to deny petition for writ of certiorari in this case.

## PARTIES TO PROCEEDINGS BELOW

1. Sam S. Jenkins, Sr., Petitioner
2. State of New Mexico Securities Division, Respondent

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A. The decision of the Appellate Court violated the New Mexico Statutes and thereby deprived Petitioner of due process and equal protection of the laws.

B. The decision of the court of appeals was based on other errors

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APPENDIX.....21

A. Final order of Securities Div. of the State Of New Mexico, August 9, 1994

B. Petitioner's Response Brief to NMCA Calendar Notice, December, 20, 1994

C. New Mexico Court of Appeals Memorandum Opinion, March 16, 1995

D. Supreme Court Of State of New Mexico Order, April 10, 1995 Appellant

## TABLE OF AUTHORITIES CITED

### CASES

**Arizona v. Allen 490 P.2d 10**

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"In crder for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions.....it must be shown that there were repeated and successive transactions and that sales were made for the benefit of the issuer".

**Arizona v. Allen 107 Ariz. 538**

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"Supreme Court of Arizona ruled the sale of stocks, although securities was an "isolated transaction" and not subject to the registration requirement of the Securities act".

**Davies v. Acware Plastics 254 P.2d 663**

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"Court of Appeals ruled where president and treasurer of a corporation was not engaged in

business of selling stock and sale of his personal stock to another was a "single" isolated transaction and he was not subject to the Securities act".

**Gales v. Weldon 282 S.W. 2d 522**

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"See text State v. Weisser"

**Kneeland v. Emerton 183 N.E. 155**

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"See text State v. Weisser"

(Table Of Authorities Cont'd.)

**Marble v. Clein 347 P.2d 830**

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"Appellant claimed he was not in the business of regularly dealing in securities and that his sale of stock was a single isolated transaction unconnected with his regular occupation and he was not subject to the Securities act. Supreme Court of Washington agreed with Appellant".

**Nelson v. State 355 P.2d 413**

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"Isolated non-issuer transaction is exempt from

the operation of the statutes.

**New Mexico Statute 58-13B-27**

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"Exemption from the Securities act as "Isolated non-issuer transaction" under exempt transactions. No violations occur under exempt transactions".

**State v. Weisser 161 N.W. 2d 360**

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"An isolated sale of a security means one standing alone, disconnected from any other, whereas repeated successive sales means transactions undertaken and performed one after the other and sales made within a period of such reasonable time to indicate that one general purpose actuates the vendor and that such sales promote the same general aim and are not part of a single plan" (Table Of Authorities Contd.)

**U.S. Constitution Ammd. V, IX, X, XIV**

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"Due process and Equal Protection of the Laws"

"Targeting and selective prosecution by state or government in civil rights violation"

## STATUTES

N.M. Statute 58-13B-27

U.S. Const. Amend. V

U.S. Const. Amend IX

U.S. Const. Amend X

U.S. Const. Amend. XIV

## PETITION FOR WRIT OF CERTIORARI

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Sam S. Jenkins, Sr. of Albuquerque, New Mexico, respectfully petition a Writ of Certiorari be issued to review an opinion and judgement of the New Mexico Court of Appeals.

## OPINION BELOW

Sam S. Jenkins, Sr., pro se Appellant applies to the Supreme Court Of The United States for review of;

The Final Order of the Securities Division Of The State Of New Mexico filed August 9, 1994, (Appendix "A" attached)

The New Mexico Court of Appeals' Memorandum Opinion in this cause filed March 16, 1995, (Appendix "C" attached) and The Supreme Court Of The State Of New Mexico Order entered in this cause on April 10, 1995, (Appendix "D" attached)

This petition is timely if filed in The Supreme Court Of The United States if filed on

or before July 10, 1995.

**JURISDICTION**

Exhausted appeals in State of jurisdiction ending with Final Order from the Supreme Court Of The State of New Mexico. Entry of Order from NMSC was April 10, 1995. This Petition is timely filed.

**CONSTITUTIONAL PROVISIONS AND STATUES**

New Mexico Statutes 58-13B-27 (Exempt Transactions) so states;

"The following transactions are exempted from Section 58-13B-20 NMSA 1978 and, unless otherwise noted, Section 58-13B-29 NMSA 1978: (A) An isolated non-issuer transaction, whether or not effected through a broker dealer."

The Constitution of The United States;"Due Process and Equal Protection of the Laws" Amendments V, IX, X, XIV

STATEMENT OF CONSTITUTIONAL QUESTIONS RAISED

IN THE COURT OF APPEALS, STATE OF NEW MEXICO, Appellant Petition For Review, filed

September 4, 1994, Page 1, Appellant raised issue of "Political persecution under the guise of judicial prosecution in violation of constitutional rights". Page 2, Appellant raised issue of "constitutional conflict with the trier of facts in the Securities Division". December 20, 1994, Appellant Response Brief to Calendar Notice in the New Mexico Court of Appeals, Page 4, Appellant states "The Securities Commission pursuit of the alleged complaint was an act of political persecution under the guise of judicial prosecution violating Appellants constitutional rights under due process". Page 5, Appellant states, "A constitutional conflict exists in a number of areas, the trier of fact for the Securities Commission is a lawyer in a related case with the Appellant". "Appellant requests Court to apply financial sanctions against Securities Commission for unconsciable and willful acts of harassment in pursuing Appellant in an action which they knew the Appellant was exempt under

the statutes". Supreme Court Of The State Of New Mexico, Appellants Petition For Writ Of Certiorari, filed March 22, 1995, Page 1, Appellant raises issue of constitutional violation of New Mexico Court of Appeals to dismiss on calendar notice when State Statute supported appellants petition. Page 3, Appellant raises issue of "Selective Prosecution" by Government agency of Appellant.

## STATEMENT OF THE CASE

### 1. Course Proceedings Below

This a case is in which the New Mexico Securities Division alleged violations of the New Mexico Securities Statutes. The claims of the Securities Division are governed by New Mexico law. The Plaintiff is the New Mexico Securities Division. The defendant is Sam S. Jenkins, Sr.. There are no other parties to the litigation. (See Appendix "A")

NMSD filed their order on July 15, 1993, alleging the defendant had violated the State Securities statutes of the State of New Mexico.

The defendant answered on July 26, 1993 denying the allegations, claiming that no statutes had been violated.

A hearing was held on October 14, 1993 with John B. Hiatt acting as hearing officer. Defendant raised the issue that Hiatt was the supervisor of another lawyer in another

government agency where the defendant had alleged a lawyer conspiracy attempting selective prosecution.

Defendant argued there were no violations of the Securities statutes as the act complained of was an "isolated transaction" by the very definition of the N.M. Securities statutes NM 58-13B-27 and was an "exempt" transaction. Defendant argued he was targeted for selective political persecution under the guise of judicial prosecution.

The Securities Division found the defendant's acts did not meet the requirements of an "exempt" transaction and ordered defendant to pay a total civil penalty in the amount of $2000.00.

Petitioner then appealed the order to the New Mexico Court of Appeals. The Court of appeals suggested a "calendar disposition". Petitioner filed a response brief to the calendar notice and supporting memorandum

(See Appendix "B").

The New Mexico Court of Appeals issued a Memorandum Opinion on March 16, 1995, affirming the judgement of the NMSD (See Appendix "C"). This opinion is highlighted with several errors. The Court in adopting the recommendations of the hearing officer referred to the "shares in All States Publishing, Inc., offered by Respondent. No shares of stock were offered "in" All States Publishing, Inc., but rather shares in a book held "by" All States Publishing, Inc.. The Court further states "the Securities Division started their investigation before learning of the content of the book". Evidence shows this to be untrue.

The Court of Appeals almost totally disregarded the main issue, that of an "isolated transaction" and therefore exempt under the New Mexico statutes.

A petition was filed by petitioner for review to the New Mexico Supreme Court and no consideration for review was given that petition

with order denying the petition issued on April 10, 1995 (See Appendix "F").

Petitioner now seeks review by this Court of whether the New Mexico Securities Division targeted petitioner for selective prosecution with due process and equal protection of the law being denied the petitioner. And whether the New Mexico Court of Appeals refusal to remand the case for further proceedings or to consider the argument of an "isolated transaction" and therefore "exempt" under the New Mexico statutes suggests a continuation of political persecution under the guise of judicial prosecution thereby depriving petitioner of his constitutional rights.

## 2. Factual Background

Appellant is an author and writer. This cause arises out of a book written and published under title of; "Dracula In Charge Of The Bloodbank, An Expose Of The American Judicial System". The author, after six years of research had exhausted funds for publication and offered to sell "shares in the book" to assist cost in publication of the book. The author had previously sold some book shares to All States Publishing, Inc., a New Mexico closely held corporation controlled by the author's daughter. All States Publishing, Inc., agreed to further assist the author in publication costs and agreed to resell some of it's shares in the book. The author ran a classified advertisement with intent to sell an interest in the book and or resale of some of the shares owned by All States Publishing, Inc.. (No sale resulted as funds were obtained from other sources). An agent of The New Mexico Securities division

inquired by telephone about the offer. The agent's inquiry turned to the title of the book and about the book's contents-concluding it was not complimentary of the dominant lawyer culture in America.

The agent after a period of time then followed up and made an appointment to see materials on the book and talk about the book shares in an "undercover" visit with the author. The agent requested copies of the materials and then left the interview. Ninety days after the undercover agents visit (one a lawyer), the Securities Division filed a complaint against appellant based upon mis-statements of the undercover agents and conclusions of laws not supported by the N.M. Statutes or case law.

From the beginning of the case, the Appellant had reason to believe and stated on the record that this cause represents an act of "selective prosecution" not based upon sound conclusions of law. Since the book published by the appellant is not complimentary of lawyers

and the fact that lawyers dominated this cause beginning with an undercover lawyer setting up the "sting" to a government division headed by a lawyer to division staff lawyers prosecuting the cause to a lawyer acting as the hearing officer, the theory of "selective prosecution" and a lawyer conspiracy goes far beyond mere circumstantial evidence. The classified ad exacted below from the newspaper is the ad which triggered the investigation and was not unlike many ads of a similar nature placed under money wanted by others.

"Small investment 15% guaranteed return. Multi-published author. 292-7670 X8 or 821-7522".

Appellant has discovered that similar money wanted ads run by other advertisers during that period of time, in the same newspaper, were not called, interviewed or questioned by the New Mexico Securities Division about their ad. A fact which appears to be selective prosecution or "political persecution under the guise of

judicial prosecution", a clear violation of appellants' constitutional rights under XIV of the U.S. Constitution.

The prosecution, order or judgement by the New Mexico Securities Division is not supported by law or evidence presented in testimony at the hearing. The state statutes do not support the evidence in the case. The Securities act does not require licensing and registration of anyone making an offering which is exempt under the act. Appellant therefore could not have violated the Securities act.

The Securities Division Conclusions of Law are faulty and the opinion of the Appellate court simply compounds the fault. The conclusions in both instances disregard the volumes of case law and the New Mexico Statutes describing and defining the exact transaction of the appellant as an "Isolated non-issuer transaction", which goes to the heart of the entire case.

At page 3 beginning at line 2, the Appeals

Court Memorandum devotes the majority of it's opinion on "points of law" beyond it's review powers as being the substance of appeal. A review of the appeal by Appellant and Appellant's Brief To Calendar Notice clearly shows the substance of the appeal is in fact the issue of a statutory exemption in the transaction-which statute is the root issue in the case.

At page 4 beginning at line 3, the Appeals Court Memorandum errors in it's summation claiming shares offered by respondent were "shares in All States Publishing, Inc." No shares were offered in All States Publishing, Inc., but rather shares in the book sold to All States Publishing, Inc., which shares All States Publishing, Inc., agreed to resell if needed. The single fact to be considered is the N.M. statute and other case law which defines Appellant's transaction as an "exempt isolated non-issuer transaction". An exempt transaction would have precluded the Securities Division

complaint and all allegations therein. This fact has not been given significant weight and consideration making this a wrongful action from the beginning.

## REASONS FOR GRANTING THE WRIT

### A. SIGNIFICANT QUESTION UNDER THE NEW MEXICO STATUTES AND THE U.S. CONSTITUTION

New Mexico Statutes 58-13B-27 (Exempt Transactions) so states in part; The following transactions are exempted from Section 58-13B-20 NMSA 1978 and unless otherwise noted, Section 58-13B-29 NMSA 1978: Case law in the table of authorities support Appellant on this question.

> An isolated non-issuer transaction, whether or not effected through a broker-dealer.Under the U.S. Constitution Appellant is entitled to equal protection of the laws. The laws were not applied equally in this case, but rather applied selectively to this Appellant.

ARGUMENT

The statute at issue, N.M. 58-13B-27 (Exempt Transactions) and Federal Securities Act precludes the requirement for licensing and registration under the New Mexico Securities Act. The transaction was exempt under law and therefore the act did not violate in any way either through failure to license, to register or to offer. What occurred here was an act of

selective prosecution by a government bureaucracy headed up lawyers. The original complaint is prima facia evidence of the old lawyer ploy of throwing as much dung against the wall as possible, hoping something will stick. The Securities Division admitted much of it did not stick and acknowledged the same. Laws are not intended to be a selective tool for lawyer whims. The only remaining option under the complaint by these prosecutorial lawyers to get anything to stick was to simply disregard the statutes and the laws. This resulted in the entry of an order not intended, nor not at all consistent with the purposes fairly intended by the policy and provisions of the act.

Appellant is not in a business nor related business nor has been in such a business to sell securities. Therefore any alleged violation of the Securities Act would by necessity be technical in nature or an isolated transaction by definition and not subject to the act.

The legislative intent in both the state

and federal statutes was to give the term "isolated transaction" its ordinary meaning of "isolated", which is unique, occurring alone or once, sporadic, not likely to recur. Volumes of case law abide this definition. Such an exemption was to prevent the "overreach" abusive action by a government bureaucracy exactly as has occurred in the instant case. See; Nelson v. State, 355 P.2d 413, State v. Weisser 161 N.W. 2d 360, Kneeland v. Emerton, 183 N.E. 155, Gales v. Weldon, 282 S.W. 2d 522, Arizona v. Allen 107 Ariz. 538, Davies v. Acware Plastics 254 P.2d 663. In order for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions, and are not made for the benefit of the issuer or an underwriter of the securities, it must be shown that there were repeated and successive transactions and that the sales were made for the benefit of the issuer or the underwriter Arizona v. Allen

490 P.2d 10.

The legal standard applied and well should be applied in most claims of exempt isolated transactions is whether the party claiming the exemption has been engaged in the business of dealing in securities and is the transaction unconnected from his regular occupation. In this case the party claiming the exemption has not engaged in the business of dealing in securities and the transaction is unconnected from his regular occupation. See Marble v. Clein 347 P.2d 830

**CONCLUSION**

If the Court of Appeals was correct in it's conclusion that the issue was one of fact for the trier of facts, then the New Mexico Securities erred in the question of law. In that event, the Court of appeals should be instructed to remand the case to the District Court so the issue may be resolved by Jury. If the Court of Appeals was incorrect, and the question was one of law, then the Court of

Appeals refusal to review the issue was erroneous denying petitioner his due process and the Court of Appeals should be instructed to review the NMSD legal determination of the laws and statutes governing "isolated transactions" and "Exemptions under the statutes". In either event Petitioner requests that this Court reverse the decision of the Court of Appeals or the case be remanded to the district Court for a trial by jury.

**WHEREFORE**, the petitioner, Sam S. Jenkins, Sr., respectfully requests that, a writ of certiorari should issue to review the decision of the Order of the Securities Division of The State Of New Mexico, The Memorandum Opinion Of The Court of Appeals of the State Of New Mexico and the Order denying Writ of Certiorari by the Supreme Court Of The State Of New Mexico and the Original Order issuing from the New Mexico Securities Division be reversed.

Respectfully Submitted,

Sam S. Jenkins, Sr.

By:_____

Pro se for Appellant
POB 21032
Albuquerque, New Mexico 87154
Telephone: 505-821-7522

I HEREBY CERTIFY three copies of the foregoing pleading has been mailed to the parties of record this_____day of September, 1995.

By_____

Sam S. Jenkins, Sr., Petitioner

# APPENDIX

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

vs.

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COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

SAM S. JENKINS, SR.,

Respondent-Appellant

No. 15,836

(State of New Mexico Securities Division, order No. 94-93-064-125(FO))

CALENDAR NOTICE

You are hereby notified that the:

**Record Proper**

was filed in the above-entitled cause on **November 10, 1994.** This case has been assigned to the **SUMMARY CALENDAR.**

Summary affirmance is proposed.

We are hereby quash the Order to Show Cause issued by this court on October 21, 1994 in light of the Respondent's response dated November 3, 1994.

**Issues on Appeal.** Judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, p.2d 555, 557 (Ct. App. 1987) In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was within the scope of the administrative body's authority. Anaya v.New Mexico Personal Board, 107 N.M. 622, 625, 762, p.2d 909, 912, (Ct. App.), cert. denied, 107 N.M. 673, 763, p.2d 689 (1988). This Court must determine whether, on balance, the record as a

whole contains substantial evidence to support the Security Divisions findings. Id,; see also in re Mountain Bell, 109 N.M. 504,505, 787 p. 2d 423, 424 (1990)and It's Burger Time, Inc. v. New Mexico Dept't of Employment Sec. Dep't Bd. of Review, 108 N.M. 175, 177, 769, p.2d 88, 90, (1989). We must also determine that the findings made support the conclusions of law that the conclusions of law are sound.

In adopting the recommendations of the hearing officer, the Securities Division concluded that 1) the shares in All States Publishing, Inc. offered by the respondent (see plaintiff's exhibits 2, 3 and 4) were "securities" within the meaning of NMSA 1978, Section 58-13B-2 (V) (Repl. Pamp, 1991) of the Securities Act of 1986 (the "Act"); 2) Respondent violated NMSA 1978, Section 58-13B-20 (Repl. Pamp. 1991) of the act by offering to sell securities which were neither registered nor exempt under the Act; 3)Respondent violated Section NMSA 1978, Section 58-13B-3

(A)(Repl. Pamp. 1991) of the Act by offering to sell securities as an unlicensed sales representative; 4) the Division did not sustain its burden of proof in showing that Respondent's conduct violated NMSA 1978, Section 58-13B-5 (Repl. Pamp. 1991) of the Act by acting as an unlicensed investment advisor; and (5) given these violations, it was in the public interest and consistent with the purposes of the Act to enter a final order. (RP4) In the Final Order. the Securities Division offered the respondent to 1) cease and desist from soliciting, offering, and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and (2) within thirty days of the receipt of the Order pay a total civil penalty in the amount of $2,000.00 pursuant NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act. (RP 5)

Based on the Docketing Statement, except for the legal issues discussed below, Repondent's "Points" on appeal (DS 3-4) appear to be matters relating to the conduct of witnesses

and attorneys, the bases of facts the creditability and truthfulness of the witnesses involved and documents presented at the Securities Division hearing-- all matters for the factfinder rather than this Court. See Herman v Miners' Hosp., 111 N.M. 550, 552, 807 P. 2d 734, 736, (1991) ("to determine whether a challenged finding is supported by substantial evidence, we have always given deference to the factfinder, even when we apply... whole record review"). Moreover, the existence conflicting or contradictory evidence obligates the factfinder to resolve the conflicts and contradictions. See Mascarenas v. Jaramillo, 111 N.M. 410, 412, 806 P2d 59, 61, (1991) (only the trier of fact may weigh the testimony, determine the creditability of witnesses, reconcile inconsistent or contradictory statements of a witness, and say where the truth lies). This Court would have been able to determine whether greater weight would have been due

Respondent's position if Respondent had provided this court with a clear summary of the facts presented below of which he bases his conclusory allegations on appeal of "unsupported evidence" (Point 1); "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case (Point 3); "mis-statements and deception" (Point 4); "erroneous" discussion of facts and "mis-statements" (Point 6); and "political persecution" (point 7). See Thornton v. Gamble, 101 N.M. 764, 769, 688, P. 2d 1268, 1273 (Ct. App. 1984) (counsel must set out relevant facts in the docketing statement). Accordingly, we propose to affirm the Securities Division August 9, 1994 Order as based on substantial evidence on the record as a whole with regard to the Points raised by Respondent relating to the creditability and truthfulness of the witnesses, integrity of the hearing officer, and findings of fact made by the Securities Division.

On the legal issues, based on our review of the record, including the exhibits presented at the hearing and the relevant case law, we propose to hold that the Securities Division applied the law correctly. We propose to affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(v) (Repl. Pamp. 1991); see also State v. Sheets 94 N.M. 356, 360-361, 610 P.2d 760, 764-765 (Ct.App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

Moreover, we are not convinced on the record before us after review of the relevant statutes and case law, that Respondent's offering of securities is exempt from the registration requirements set forth in Section 58-13B-20 under NMSA 1978, Section 58-13B-27(A) (Repl. Pamp. 1991) (exemption for an isolated non-issuer transaction). Respondent acted as an unlicensed sales representative of the issuing company,

offering shares of stock as investment opportunities, hence securities, to the public pursuant to a newspaper article, information sheet, and certificate of shares and purchase agreement. (Plaintiff's Exhibits 2, 3 and 4 to the hearing). Whether any sales actually took place (Point 3, DS 3) is irrelevant to that determination under Section 58-13B-20, since the statute forbids unregistered nonexempt offerings or sales of securities. Given the content of the newspaper advertisement and the information sheet, we believe that Respondent's offering is exactly the kind of offering of securities that the securities laws were designed to protect the public against. See White v. Solomon, 105, N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App.), cert.denied, 731 N.M. 290, 731, P.2d 1334 (1987) (the purpose of the securities laws is generally help to be the protection of the public from various methods of unlawful sales of securities). Moreover, we are not persuaded by White, cited by Respondent in the Docketing Statement , that Respondent's offering was an

isolated non-issuer transaction entitled to an exemption under NMSA 1978, Section 58-13-B27(A), since that exemption is designed to cover commercial transactions such as the one time sale of two businesses.

Finally, in the Docketing Statement Respondent has not given this Court any facts raised below or legal authorites which support his assertion that he was exempt from the sales representative licensing requirements of NMSA 1978, Section 58-13B-3(A) (Repl.Pamp. 1991) or entitled to isolated non-issuer transaction exemption under Section 58-13B-28(A), in a situation where the Act places the burden upon the person claiming an exemption. See NMSA 1978, Section 58-13B-28(B) (Repl. Pamp. 1991); see also Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 113 N.M. 9,12,820,P.2d 1323, 1326 (1991) (when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in the manner most favorable to the prevailing party, indulging all reasonable

inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary).

The hearing officer's findings of fact and conclusions of law appear to be based on substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we propose to affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994. If Respondent has additional facts or authorities to bring to this Court's attention, he should do so in a memorandum pursuant to SCRA 1986, 12-210(D) (3) (Repl. 1992).

_____

Judge

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

No. 15,836

vs.

COURT OF APPEALS NEW MEXICO
FILED
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SAM S. JENKINS, SR.,

Respondent-Appellant

**APPELLANT RESPONSE BRIEF TO CALENDAR NOTICE**

**AND**

**SUPPORTING MEMORANDUM**

COMES NOW SAM S. JENKINS, SR., pro se and files this Brief and Memorandum in Appeal and for this cause states;

1. INTRODUCTORY FACTS:

A. Appellant is not a Broker, Sales Representative or other entity required to be licensed under the New Mexico Securities Act.

B. Appellant is not in a business nor has been in such business to sell securities. Therefore any alleged violation of the Securities Act would by necessity be technical in nature or an isolated transaction and not subject to the act.

C. Appellant is an author and writer and the instant cause arose out of this author advertising to sell an interest in his current book, now published. In fact the ad was withdrawn and no sale of interest in the book resulted.

D. The advertising in the instant cause was exempt from the Securities act as "Isolated non-issuer transaction" under exempt transactions NM 58-13B-27 and therefore no violation occurred or could have occurred.

E. Since the transaction was an exempt transaction, the Securities attempt to frame the transaction as a violation is moot.

II. EXEMPT TRANSACTION, LAW INCORRECTLY APPLIED TO FACTS:

A. The Securities act does not require licensing and registration of persons offering or selling exempt transactions under the securities act. The law has been incorrectly applied to the facts in this case.

B. The transaction described in this case is exactly the kind of transaction described as an exempt Isolated non-issuer transaction under Securities statute NM 58-13B-27. The legislative intent was to give the term "Isolated transaction" its ordinary meaning of "isolated" which is "unique, occurring alone or once, sporadic, not likely to recur. Such an exemption was to prevent the "overeach" abusive action by a government bureaucracy exactly as has occurred in the instant case.

C. Under the Securities act an "Isolated non-issuer transaction" is exempt from the operation of the statute, See Nelson v. State,

355 P. 2d 413. Isolated transactions are also excempt under other simular statues regulating traffic in securities, See State v. Weisser 161 N.W. 2d 360. An "isolated" sale of security means one standing alone, disconnected from any other, whereas repeated successive sales means transactions undertaken and performed performed one after the other and sales made within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that such sales promote the same general aim and are not so detatched and separated as to form no part of a single plan, See Kneeland v. Emerton, 183 N.E. 155 and See Gales v. Weldon, 282 S.W. 2d 522.

In order for a transaction to be removed from the scope of an exemption in an "isolated transaction" where sales are not made in the course of repeated or successive transactions, and are not made for the benefit of the issuer or an underwriter of the securities, it must be shown that there were repeated and successive

transactions and that the sales were made for the benefit of the issuer or an underwriter, See State v. Allen 490 P.2d 10.

The legal standard applied in most claims of exempt isolated transactions is whether the party claiming the exemption has been engaged or is engaged in the business of dealing in securities and is the transaction unconnected from his regular occupation. See Marble v. Clein 347 P.2d 830;

Appellant in this case contended that he was not regularly engaged in the business of dealing in securities, and that this was a single, isolated act unconnected with his regular occupation. He further claims that the complaint does not allege any facts from which an inference can be drawn that such dealings were a regular practice with him. The Supreme Court of Washington agreed with Appellant. See State Of Arizona v. Allen 107 Aris. 538

Defendant Allen sold his own stocks through an offer in writing to ten different prospects. The Supreme Court of Arizona ruled the sale of stocks, although securities, was an "Isolated transaction" and not subject to the registration requirement of the Securities act.

See Davies v. Acware Plastics 254 P.2d 663

Gummo sold stock and complaint alleged that the stock was sold for the benefit of the corporation and no registration under the securities act was obtained and therefore was a violation of the securities act. The Court of Appeals in this case ruled where president and treasurer of a corporation was not engaged in business of selling stock, and sale of his personal stock to another was a "single, isolated transaction", he was not subject to the securities act.

## CONCLUSION

It becomes apparent from the above that the Securities Commission had no standing to pursue

the instant cause once the evidence obtained early on pointed to an exempt "isolated transaction" under the securities act. That the Securities Commission pursuit of the alleged complaint was an act of political persecution under the guise of judicial prosecution violating Appellants constitutional rights under due process.

Appellant further concludes such pursuit occurred only because appellant was an author who had written a book on the American judicial system and the dominant lawyer culture in America, which book is not complimentary of that culture. A constitutional conflict presents itself here. That conflict of interest was pervasive in this case from beginning to end. First, an alleged complaint by a government agency headed by a lawyer who had evidence of an exempt transaction before the complaint was issued. Secondly, a personal investigation by a lawyer. Third, a trier of facts or fact

finder who is a lawyer in a related case with the Appellant. Fourth and finally erroneous conclusions of law applied to the facts by lawyers number one and three.

Appellant requests this Court reverse the order of the Securities Commission based upon applicable law incorrectly applied to the facts in this case. Appellant further requests this Court to order financial sanctions against the Securities Commission Agency for unconsciable and wilful acts of harrassment in pursuing Appellant in an action which they knew by all standards was exempt from the Securities act.

Respectfully Submitted

SAM S. JENKINS, SR., pro se
For Appellant
POB 21032
Albuquerque, N.M., 87154
Tel: (505) 821-7522

I hereby certify that a true copy of the foregoing pleading was mailed this 19 day of December to the Plaintiff in this case.

Sam S. Jenkins, Sr.

**IN THE COURT OF APPEALS OF THE**

**STATE OF NEW MEXICO**

**STATE OF NEW MEXICO SECURITIES DIVISION,**

Plaintiff-Appellee

No. 15,836

FILED
93 MAR 16 AM 8:30
COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

vs.

**SAM S. JENKINS, SR.,**

Defendant-Appellant

**ADMINISTRATIVE APPEAL FROM THE NEW MEXICO SECURITIES DIVISION**
**Nancy M. Smith, Director**

Michael J. Vargon
Santa Fe, New Mexico — Deputy Director New Mexico Securities Division

Sam S. Jenkins, Sr.
Albuquerque, New Mexico — Pro Se

**MEMORANDUM OPINION**

**ALARID, Judge.**

Respondent Sam S. Jenkins, Sr. appeals the

Securities Division order dated August 9, 1994. This Court's calendar notice proposed to affirm the order of the Securities Division. Respondent filed an untimely memorandum in opposition to this Court's proposed disposition, due December 13, 1994, but filed on December 20, 1994. Even if we consider the arguments made by Respondent in the untimely memorandum, however, we are unpersuaded by them for the following reasons.

In the calendar notice, we stated that judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, P.2d 555, 557 (Ct. App. 1987). In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this Court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was

within the scope of the administrative body's authority. Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 625, 762, P.2d 909, 912 (Ct. App.)cert. denied, 107 N.M. 673, 763, P.2d 689 (1988). This Court must determine whether, on balance, the record as a whole contains substantial evidence to support the Security Division's findings. Id.; see also In re Mountain Bell, 109 N.M. 504, 505, 787, P.2d 423, 424 (1990). and In re Apodaca, 108 N.M. 175, 177, 769, P.2d 88, 90 (1989). We must also determine that the findings made support the conclusions of law and that the conclusions of law are sound.

In Adopting the recommendations of the hearing officer, the Securities Division concluded that: (1) the shares in All States Publishing Inc. offered by Respondent were "securities" within the meaning of NMSA 1978, Section 58-13B-2(V) (Repl. Pamp, 1991) of the Securities Act of 1986 (the "Act"); (2) Respondent violated

NMSA 1978, Section 58-13B-20 (Repl. Pamp. 1991) of the Act by offering to sell securities which were neither registered nor exempt under the Act; (3) Respondent violated Section NMSA 1978, 58-13B-3(A) (Repl. Pamp. 1991) of the Act by offering to sell securities as an unlicensed sales representative; (4) the Division did not sustain its burden of proof in showing that Respondent's conduct violated NMSA 1978, Section 58-13B-5 (Repl. Pamp. 1991) of the Act by acting as an unlicensed investment advisor; and (5) given these violations, it was in the public interest and consistent with the purposes of the Act to enter a final order. In the Final Order, the Securities Division ordered the Respondent to: (1) cease and desist from soliciting, offering, and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and (2) within thirty days of the receipt of the order pay a total civil penalty in the amount of $2,000.00

pursuant to NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act.

After reviewing the memorandum in opposition, we continue to believe that except for the legal issues discussed below, Respondent's "Points" on appeal appear to be matters relating to the conduct of witnesses and attorneys, the bases of facts, the credibility and truthfulness of the witnesses involved, and documents presented at the Securities Division hearing--all matters for the fact finder rather than this Court. See Herman v. Miner's Hosp., 111 N.M.550, 552, 807, P.2d 734, 736, (1991)("to determine whether a challenged finding is supported by substantial evidence, we have always given the deference to the fact finder, even when we apply... the whole record review"). Moreover, as we stated in the calendar notice, the existence of conflicting or contradictory evidence obligates the fact finder to resolve the conflicts and contradictions. See

Mascarenas v. Jaramillo, 111 N.M. 410, 412, 806, P.2d 59, 61, (1991) (only the trier of fact may weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and ascertain the truth).

After reviewing the Memorandum, and because the Securities Division began its investigation of Respondent prior to learning about the content of the book Respondent was writing, we continue to believe that Respondent has provided this court with essentially conclusory allegations on appeal of "unsupported evidence"; "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case; "mis-statements and deception"; "erroneous" discussion of facts and "mis-statements"; and "political persecution". See Thornton v. Gamble, 101, N.M. 764, 769, 688, P.2d 1268, 1273, (Ct.App. 1984)(counsel must set out all relevant facts in the docketing

statement).

Accordingly, we affirm the Securities Division August 9, 1994 order as based on substantial evidence on the record as a whole with regard to the points raised by Respondent relating to the credibility and truthfulness of the witnesses, integrity of the hearing officer,and findings of fact made by the Securities Division.

On the legal issues, we hold that the Securities Division applied the law correctly. First, we affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(V) 27(A) (Repl.Pamp 1991; see also State v. Sheets, 94 N.M. 356, 360-361, 610 P.2d 760,764-765 (Ct.App.), cert denied, 94 N.M. 675, 615, P.2d 992 (1980).

Second, we are not convinced on the record before us after review of the relevant statues, New Mexico case law and the out-of-state case

law cited by Respondent in the memorandum that Respondent's offering of securites is exempt from the registration requirements set forth in Section 58-13B-20 under NMSA 1978, Section 58-13B-27(A) (Repl. Pamp. 1991)(Exemption for and isolated non-issuer transaction). Respondent acted as and unlicensed sales representative of the issuing company by offering shares of stock as investment opportunities, hence as securities, to the public pursuant to a newspaper advertisement,information, sheet certificate of shares, and purchase agreement, for the benefit of himself/his company, the issue. Whether any sales actually took place is irrelevant to the determination under Section 58-13B-20, since that statute forbids unregistered nonexempt offerings or sales of securities. Moreover, under the current New Mexico law, the isolated non-issuer transaction exemption is designed to cover commercial transactions such as the one time sale of two

businesses. White v. Solomon 105 N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App. 1986), cert. denied 105 N.M. 290, 731 P.2d 1334 (1987).

Finally, Respondent has not given this Court any facts raised below or legal authorities which support his assertion that he was exempt from the sales representative licensing requirements of Section 58-13B-3(A), in a situation where the Act places the burden upon the person claiming an exemption See NMSA 1978, Section 58-13B 28(B) (Repl.Pamp. 1991);see also Golden Cone Concepts, Inc. v Villa Linda Mall, 113 N.M. 9, 12, 820, P.2d 1323, 1326 (1991) ("when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging in all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary").

The hearing officer's findings of fact and conclusions of law appear to be based on

substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994.

**IT IS SO ORDERED.**

A. JOSEPH ALARID, Judge

**WE CONCUR:**

RUDY S. APODACA, Chief Judge

HARRIS L HARTZ, Judge

(8)

Supreme Court, U.S.
FILED

No. 95-826 JUL 10 1995

OFFICE OF THE CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1995

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SAM S. JENKINS SR.,

*Petitioner*

vs.

STATE OF NEW MEXICO SECURITIES DIVISION

*Respondent*

---

# SUPPLEMENTARY APPENDIX TO WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE NEW MEXICO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SAM S. JENKINS, SR.,
PRO SE APPELLANT
POB 21032
ALBUQUERQUE, N.M. 87154
TELEPHONE: 505-821-7522

November 14, 1995

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12 pp

**IN THE COURT OF APPEALS OF THE**

**STATE OF NEW MEXICO**

**STATE OF NEW MEXICO SECURITIES DIVISION,**

Plaintiff-Appellee

No. 15,836

vs.

**FILED**
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**COURT OF APPEALS**
**STATE OF NEW MEXICO**
**P.R. WALLACE, CLERK**

**SAM S. JENKINS, SR.,**

Defendant-Appellant

**ADMINISTRATIVE APPEAL FROM THE**
**NEW MEXICO SECURITIES DIVISION**
**Nancy M. Smith, Director**

Michael J. Vargon
Santa Fe, New Mexico — Deputy Director New Mexico Securities Division

Sam S. Jenkins, Sr.
Albuquerque, New Mexico — Pro Se

**MEMORANDUM OPINION**

**ALARID, Judge.**

Respondent Sam S. Jenkins, Sr. appeals the

Securities Division order dated August 9, 1994. This Court's calendar notice proposed to affirm the order of the Securities Division. Respondent filed an untimely memorandum in opposition to this Court's proposed disposition, due December 13, 1994, but filed on December 20, 1994. Even if we consider the arguments made by Respondent in the untimely memorandum, however, we are unpersuaded by them for the following reasons.

In the calendar notice, we stated that judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, P.2d 555, 557 (Ct. App. 1987). In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this Court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was

within the scope of the administrative body's authority. Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 625, 762, P.2d 909, 912 (Ct. App.)cert. denied, 107 N.M. 673, 763, P.2d 689 (1988). This Court must determine whether, on balance, the record as a whole contains substantial evidence to support the Security Division's findings. Id.; see also In re Mountain Bell, 109 N.M. 504, 505, 787, P.2d 423, 424 (1990). and In re Apodaca, 108 N.M. 175, 177, 769, P.2d 88, 90 (1989). We must also determine that the findings made support the conclusions of law and that the conclusions of law are sound.

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pursuant to NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act.

After reviewing the memorandum in opposition, we continue to believe that except for the legal issues discussed below, Respondent's "Points" on appeal appear to be matters relating to the conduct of witnesses and attorneys, the bases of facts, the credibility and truthfulness of the witnesses involved, and documents presented at the Securities Division hearing--all matters for the fact finder rather than this Court. See Herman v. Miner's Hosp., 111 N.M.550, 552, 807, P.2d 734, 736, (1991)("to determine whether a challenged finding is supported by substantial evidence, we have always given the deference to the fact finder, even when we apply... the whole record review"). Moreover, as we stated in the calendar notice, the existence of conflicting or contradictory evidence obligates the fact finder to resolve the conflicts and contradictions. See

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After reviewing the Memorandum, and because the Securities Division began its investigation of Respondent prior to learning about the content of the book Respondent was writing, we continue to believe that Respondent has provided this court with essentially conclusory allegations on appeal of "unsupported evidence"; "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case; "mis-statements and deception"; "erroneous" discussion of facts and "mis-statements"; and "political persecution". See Thornton v. Gamble, 101, N.M. 764, 769, 688, P.2d 1268, 1273, (Ct.App. 1984)(counsel must set out all relevant facts in the docketing

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Accordingly, we affirm the Securities Division August 9, 1994 order as based on substantial evidence on the record as a whole with regard to the points raised by Respondent relating to the credibility and truthfulness of the witnesses, integrity of the hearing officer,and findings of fact made by the Securities Division.

On the legal issues, we hold that the Securities Division applied the law correctly. First, we affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(V) (Repl.Pamp 1991; see also State v. Sheets, 94 N.M. 356, 360-361, 610 P.2d 760,764-765 (Ct.App.), cert denied, 94 N.M. 675, 615, P.2d 992 (1980).

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businesses. White v. Solomon 105 N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App. 1986), cert. denied 105 N.M. 290, 731 P.2d 1334 (1987).

Finally, Respondent has not given this Court any facts raised below or legal authorities which support his assertion that he was exempt from the sales representative licensing requirements of Section 58-13B-?(A), in a situation where the Act places the burden upon the person claiming an exemption See NMSA 1978, Section 58-13B 28(B) (Repl.Pamp. 1991);see also Golden Cone Concepts, Inc. v Villa Linda Mall, 113 N.M. 9, 12, 820, P.2d 1323, 1326 (1991) ("when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary").

The hearing officer's findings of fact and conclusions of law appear to be based on

substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994.

**IT IS SO ORDERED.**

A. JOSEPH ALARID, Judge

**WE CONCUR:**

RUDY S. APODACA, Chief Judge

HARRIS L HARTZ, Judge

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Monday, April 10, 1995**

**NO. 22,780**

**STATE OF NEW MEXICO SECURITIES DIVISION,**

Plaintiff-Respondent

**vs.**

**SAM S. JENKINS, SR.,**

Defendant-Petitioner,

**ORDER**

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied.

IT IS FURTHER ORDERED that the Record in Cause No. **15836** is returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT
BY_____
Chief Deputy

Supreme Court, U.S.
FILED
DEC 8 1995
OFFICE OF THE CLERK

No. 95-826

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SAM S. JENKINS, SR.,
*Petitioner,*

*v.*

STATE OF NEW MEXICO, SECURITIES DIVISION,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

## RESPONDENT'S BRIEF IN OPPOSITION

WILLARD H. DAVIS, JR.
Special Assistant Attorney General, and
General Counsel
New Mexico Securities Division
725 St. Michael's Drive
Santa Fe, NM 87501
(505) 827-7140
*Counsel for Respondent*

## QUESTIONS PRESENTED

1. Whether Petitioner's newspaper advertisement offering to sell to the public shares in his book violated NMSA 1978 §58-13B-3(A), which requires state licensing for securities sales representatives.

2. Whether Petitioner's newspaper advertisement offering to sell to the public shares in his book violated NMSA 1978 §58-13B-20, which requires registration of such shares with the New Mexico Securities Division.

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| 2. This Court lacks authority to consider federal questions raised for the first time in the petition, if any, because such questions are not part of the record below | 6 |
| 3. This Court lacks jurisdiction to review the opinion of the state court below because the petition fails to state a proper basis for invoking the jurisdiction of this Court, founded upon either a federal statute or constitutional provision, as required by Rule 14.1(e) and (f) | 12 |
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No. 95-826

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In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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SAM S. JENKINS, SR.,
*Petitioner,*

*v.*

STATE OF NEW MEXICO, SECURITIES DIVISION,
*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

The respondent, State of New Mexico, Securities Division, by and through its Special Assistant Attorney General and General Counsel, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the State of New Mexico Court of

Appeals' memorandum opinion in this case. That opinion is attached to the petition as Appendix C. (Pet. A-19)

## STATEMENT OF FACTS

Petitioner authored and published a book. Petitioner transferred shares of such book to the publisher and, subsequently, attempted to raise funds to pay publishing costs by offering in a newspaper advertisement to sell shares in such book to the public. Respondent, based on results of its investigation, issued a summary order to Petitioner to cease and desist violating state law and proposing to impose sanctions. Petitioner was granted a hearing on the summary order, as provided by state law. Respondent thereafter issued its final order, concluding that Petitioner had violated the state securities act, ordering Petitioner to cease and desist violating state law, and imposing sanctions. Petitioner appealed to the state court of appeals, which affirmed the final order, and Petitioner, thereafter, sought certiorari by the state supreme court. The state supreme court denied Petitioner's request for certiorari.

Petitioner's Statement of the Case makes repeated

misrepresentations of the facts and of the proceedings below. (Pet. 5-14) Furthermore, Petitioner's Table of Contents incorrectly identifies Appendix A of the petition as the "Final order of Securities Div. of the State of New Mexico, August 9, 1994", which is the administrative order that is the subject of this appellate proceeding. Appendix A of the petition is, in fact, a copy of the November 30, 1994 Calendar Notice issued by the New Mexico Court of Appeals. (Pet. A-1)

A copy of the New Mexico Securities Division's Final Order dated August 9, 1994 is attached hereto as Appendix A, for this Court's convenience and to provide a more accurate statement of facts, correcting petitioner's misrepresentations thereof. For these reasons, the Findings of Fact contained in Appendix A (*Infra*, 1a-5a) are incorporated herein as though fully set forth.

## REASONS WHY THE PETITION SHOULD BE DENIED

**1. This Court lacks jurisdiction to review the opinion of the state court below because that opinion is based on independent and adequate state grounds.**

Petitioner seeks review by this Court of the memorandum

opinion of the New Mexico Court of Appeals (the opinion), wherein that court determined legal issues based solely on its application of the New Mexico Securities Act of 1986 (the state act), NMSA 1978, §§58-13B-1 through 58-13B-56. The opinion held that Respondent applied the state act correctly. (Pet. A-25) The opinion further held that Respondent's findings of fact and conclusions of law were based on substantial evidence on the record as a whole, that the findings support the conclusions and that the conclusions appeared to be sound. (Pet. A-27 - 28) In affirming Respondent's order, the Court of Appeals determined the following legal issues: certain shares offered by Petitioner in the book he authored were "securities" under §58-13B-2(V) of the state act; and Petitioner violated §58-13B-20 and §58-13B-3(A) of the state act when he ran a newspaper advertisement offering such shares for sale to the public. (Pet. A-25 - 27) The Court of Appeals decided only those legal issues and no federal question was either raised or decided in the proceedings below.

Petitioner submits that the sole legal issue presented for review before this Court deals with the application of a New Mexico statute

where he states in his petition "The single fact to be considered is the N.M. statute and other case law which defines Appellant's transaction as an 'exempt isolated non-issuer transaction.'" (Pet. 13) The only statute cited in the petition's table of authorities is NMSA 1978 §58-13B-27, which sets forth the exempt transactions under the state act. Except for the reference to four amendments to the United States Constitution, Petitioner's table of authorities cites only that statute and eight cases dealing with the isolated transaction exemption found in the statutes of various states other than New Mexico.

The petition fails to state a basis for invoking the jurisdiction of this Court. The only basis available to Petitioner, as set forth in 28 U.S.C. §1257 and Rule 10, is when the court below has decided a federal question, which is not the case here.

The state court opinion below determines the sole legal issue under its review by applying state statutes and case law, without reference to any federal question. The opinion is based on independent and adequate state grounds and, therefore, this Court is without jurisdiction to review it. *Illinois v. Rodriguez*, 497 U.S. 177, 183

(1990).

**2. This Court lacks authority to consider federal questions raised for the first time in the petition, if any, because such questions are not part of the record below.**

In order for this Court's jurisdiction to be invoked to review a state court decision, the highest court of the state must have decided a federal question that was properly raised in the state proceedings below. 28 U.S.C. §1257. The federal question must be raised in state appellate courts pursuant to state procedural rules. *Webb v. Webb*, 451 U.S. 493, 502 (1981). Petitioner raised 7 "points" in his docketing statement filed in the New Mexico Court of Appeals and his appeal below was limited to the legal issues presented in those "points". Rules of Appellate Procedure SCRA 1986 §12-208 (the docketing statement must include a short concise statement of the legal issues on appeal, general conclusory statements will not be accepted) (See Petitioner's Docketing Statement attached hereto as Appendix B) The Court of Appeals determined that all but one of the legal issues presented as "points" in the docketing statement were conclusory statements relating to factual matters, conduct of witnesses and attorneys at the administrative

hearing, and credibility of witnesses and documentary evidence presented to the original fact finder. (Pet. A-23) The Court of Appeals deferred those matters to the discretion of the administrative fact finder, citing *Mascarenas v. Jaramillo*, 111 N.M. 410, 412, 806 P.2d 59, 61 (1991) (only the trier of fact may weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and ascertain the truth). (Pet. A-24) Point 1 of the docketing statement presented the only legal issue and that was determined by the Court of Appeals by applying state law, i.e. that Petitioner violated the New Mexico Securities Act. (App., *infra*, 9a; Pet. A-25) Since no federal questions were raised in the docketing statement below, nor were any federal questions decided by the Court of Appeals, any such questions that might have been raised in the petition are outside the record below and, therefore, not reviewable by this Court. 451 U.S. at 496-497.

Rule 14.1(h) requires a concise statement in the petition specifying the stage in the proceedings below at which the federal question was raised; the manner of its raising and the disposition by the

courts thereof; and such quotation of specific, referenced parts of the record where the matter appears as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on the writ of certiorari. Beginning on page 2 of the petition, Petitioner attempts in vain to show that he raised various constitutional questions in the proceedings below. References to Petitioner's "Petition for Review" should be disregarded as outside the record below, because that pleading was contrary to state appellate procedure. (See Order To Show Cause Why Appeal Should Not Be Dismissed, attached hereto as Appendix C at 14a.) 451 U.S. at 502. Likewise, all references to Petitioner's "Response Brief to Calendar Notice" should be disregarded as outside the record below, because briefs are not ordinarily part of any record filed with this Court and cannot be used to establish that a federal question was raised below. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Also, the issues purported to be raised in Petitioner's brief were not in the docketing statement and, as a matter of New Mexico procedure, issues not raised in the docketing statement may not be raised for the first time

in the brief in chief. *De Tevis v. Aragon*, 104 N.M. 793, 796, 727 P.2d 558 (Ct. App. 1986). Additionally, all references on page 4 of the petition to Petitioner's "Petition for Writ of Certiorari" to the New Mexico Supreme Court should be disregarded as outside the record below, because the opinion of the Court of Appeals in this case represents the decision of the highest state court in this matter, which is the subject of this appeal, as required by 28 U.S.C. §1257. The petition should be denied because it fails to make the proper showing, pursuant to Rule 14.1(h), that federal questions were raised in the proceedings below. Rule 14.5.

Petitioner makes vague references to Amendments V, IX, X, and XIV and mentions "due process" and "equal protection of the laws" without explaining how those laws and legal concepts apply to this case. (Pet. 2,15) Also, Petitioner mentions "Federal Securities Act" without anything more being said as to how it relates to this matter. (Pet. 15) Much of this is a mere continuation of the conclusory type statements rejected by the state Court of Appeals below and should also be rejected by this Court. Petitioner's entire "Argument" portion of his

petition deals with the previous state law issues, decided by the court below, i.e. whether Petitioner violated §58-13B-3A and §58-13B-20 of the New Mexico Securities Act.

Petitioner's Question Presented does not properly state any federal question raised and decided below and should be disregarded. (Pet. i) 451 U.S. at 494-497. The first question implies selective prosecution, referring to constitutional rights under "Title 42". Title 42 is not cited anywhere else in the petition, including the list of authorities, nor is there any explanation as to what it is or how it relates to this matter. There is no reference to "Title 42" to be found anywhere in the proceedings below. The second question implies a violation of some amorphous Constitutional rights as a pro-se litigant. No explanation of those purported rights is to be found elsewhere in the petition, nor anywhere in the proceedings below. Indeed, the record clearly shows Petitioner has appeared pro-se throughout the entire proceedings in this matter and has been accorded the same, if not greater, deference as opposing counsel. Petitioner's own "Course of Proceedings Below" contradicts this allegation. (Pet. 5-8) The fourth

question implies incorrectly that Petitioner's appeal of the original administrative order to the state Court of Appeals was dismissed. That appeal was decided by the very memorandum opinion that is the subject of the petition before this Court. Memorandum opinions, such as the one before this Court in this matter, are expressly authorized, in the discretion of the reviewing court, by New Mexico Rules of Appellate Procedure, SCRA 1986 §12-405. The proper exercise by the state Court of Appeals of its discretion pursuant to state procedural rules was not challenged below and cannot be used to state a federal question for the first time before this Court. The fifth question raises for the first time a state procedural issue, questioning the authority of the New Mexico Supreme Court to deny Petitioner's Petition for Writ of Certiorari to the state Court of Appeals. The New Mexico Constitution, Article VI, §2 and Rules of Appellate Procedure SCRA 1986 §12-102 provide Petitioner with an absolute right in this matter to one appeal to the state Court of Appeals. Further review by the state Supreme Court is completely within that court's discretion, which was not challenged below. The third question, although poorly framed, deals with the only

issues that were raised and decided below, i.e. whether Petitioner violated §58-13B-3A and §58-13B-20 of the New Mexico Securities Act. As previously set forth (pp. 3-6, *supra*), the court below decided this issue by applying state law and without any reference to federal law.

The petition fails to show that Petitioner properly raised any federal question in the record below. This Court may not consider any federal question in the petition, if any, because it has been raised for the first time before this Court. 451 U.S. at 494-497.

**3. This Court lacks jurisdiction to review the opinion of the state court below because the petition fails to state a proper basis for invoking the jurisdiction of this Court, founded upon either a federal statute or constitutional provision, as required by Rule 14.1(e) and (f).**

The jurisdictional statute, 28 U.S.C. §1257, provides for review by this Court of a judgment rendered by the highest court of a state where:

> ...the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

> Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 14.1 requires the petition for writ of certiorari to include:

> (e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:
>
> ...
>
> (iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment ... in question by writ of certiorari.

Petitioner's jurisdiction statement makes no reference to any specific statutory provision, either federal or state, conferring jurisdiction of this matter on this Court as required by Rule 14.1. (Pet. 2)

Rule 14.1 further requires the petition to include:

> (f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor.

Petitioner's "Constitutional Provisions and Statutes" (Pet. 2) references three sections of the New Mexico Securities Act, followed by:

The Constitution of the United States; "Due Process and

Equal Protection of the Laws" Amendments V, IX, X, XIV

There is no verbatim setting out of the constitutional provisions cited as required by Rule 14.1(f), nor is there any exposition elsewhere in the petition as to how such provisions relate to this matter.

The petition fails to make a proper statement of specific statutes or constitutional provisions on which it invokes this Court's jurisdiction, as required by Rule 14.1, and should be denied pursuant to Rule 14.5.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLARD H. DAVIS, JR.
Special Assistant Attorney General, and
General Counsel
New Mexico Securities Division
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Santa Fe, NM 87501
(505) 827-7140
*Counsel for Respondent*

STATE OF NEW MEXICO
SECURITIES DIVISION
725 ST. MICHAEL'S DRIVE
SANTA FE, NEW MEXICO 87501

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | |
| Sam S. Jenkins, Sr. | ) | |
| | ) | |
| Respondent | ) | Order No. 94-93-064-125(FO) |

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter was the subject of a hearing on October 14, 1993, at the office of the New Mexico Securities Division. The Director, Nancy M. Smith, appointed John B. Hiatt to act as hearing officer by order dated October 13, 1993. The staff of the New Mexico Securities Division ("the Division") was represented by Michael J. Vargon, Deputy Director. The Respondent, Sam S. Jenkins, Sr., was present and represented himself. The Division presented two witnesses, Senior Special Agent, Ken Alessio and the General Counsel, Karol L. K. Pollock, both employees of the Division. Mr. Jenkins called himself as his only witness.

RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER were submitted by Mr. Hiatt to the Director on June 24, 1994. The following FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER are based upon the Director's independent review of the record of the hearing and the Hearing Officer's recommendations.

## FINDINGS OF FACT

The Director hereby finds that:

1. On July 15, 1993, Order No. 93-93-064-73(CD) and the accompanying Notice of Opportunity for Hearing were issued. See Plaintiff's Exhibit 1A.

2. On July 26, 1993, the Respondent mailed an answer to the Division responding to the allegations contained in the Division's Order identified in paragraph 1 above. See Plaintiff's Exhibit 1B.

3. On August 20, 1993, a formal hearing was set for September 15, 1993. See Plaintiff's Exhibit 1C.

4. On September 7, 1993, the Respondent waived the time limit for a hearing and requested an informal hearing. See Plaintiff's Exhibit 1D.

5. On September 20, 1993, a formal hearing was scheduled for October 14, 1993. See Plaintiff's Exhibit 1E.

6. On October 13, 1993, an order appointing John B. Hiatt hearing officer was issued. See Plaintiff's Exhibit 1F.

7. On March 28, 1993, a classified advertisement, placed and written by the Respondent, appeared in the Albuquerque Journal. The advertisement stated: "SMALL Investors! 15% guaranteed return. Multi-published author. 292-7670 X8 or 821-7522." Plaintiff's Exhibit 2.

8. On or about March 31, 1993, the Division's Senior Special Agent, Ken Alessio, called the telephone number listed in the advertisement and spoke with a man who identified himself as Mr. Lynne. The Division, as part of its enforcement program, routinely scans classified advertisements and investigates those advertisements which appear to solicit investments in securities. According to Division policy, Mr. Alessio investigated this advertisement in an undercover capacity and

assumed an alias in his dealings with the individual identified as Mr. Lynne.

9. During this initial telephone conversation, Mr. Lynne told Mr. Alessio that All States Publishing Company was raising funds for a book on the American judicial system and selling shares for $1000.00 per share with a fifteen percent guaranteed return. Mr. Alessio replied that he and his brother had $40,000.00 to invest. On April 2, 1993, Mr. Alessio called Mr. Lynne to set up a meeting on April 6, 1993, at 3815 Eubank N.E., Suite A, Albuquerque, New Mexico.

10. On April 6, 1993, Mr. Alessio and Ms. Karol L. K. Pollock arrived at the Albuquerque office in an undercover capacity and asked for Mr. Lynne. The Respondent met with Mr. Alessio and Ms. Pollock, informing them that his real name was Sam Jenkins and that Lynne was his pen name. The Respondent also stated the following:

a) He was writing a book entitled Dracula in Charge of the Bloodbank;
b) Funds had been depleted in researching the book and additional funds were needed to finish the book by June or July, 1993;
c) A company named All States Publishing was selling shares in the book for $1,000.00 per share with a guaranteed fifteen percent annual return and return of principal two years from the date of publication;
d) There was a total of 250 shares available, 150 shares belonging to All States Publishing and 100 belonging to the Respondent;
e) There were currently three investors, and the total number of investors was not to exceed half a dozen;
f) Shares were available and Respondent would be willing to sell Alessio a portion of his shares if

additional shares were needed;

g) When asked by Mr. Alessio if this investment complied with state and federal laws applying to the sale of stock, the Respondent replied that because this was not a public issue of securities, there was no need to comply with federal and state laws. In addition, because there were fewer than thirty-six investors, SEC rules did not apply.

At the conclusion of the meeting, the Respondent gave Mr. Alessio copies of two documents entitled Judicial Book Investment 4/1/93 and Certificate of Shares and Purchase Agreement. These written documents provided a description of the shares and purchase terms as related verbally by the Respondent. See Plaintiff's Exhibits 3 and 4.

11. The testimony of Mr. Alessio and Ms. Pollock differed on the exact number of shares that Respondent offered at the meeting. Ms. Pollock testified that fifty shares or more were of offered, while Mr. Alessio stated twenty share or more were of offered. The fact remains that the Respondent did offer to sell a number of All States Publishing's shares of the book to Mr. Alessio. Plaintiff's Exhibit 3 states in the last paragraph that "(t)he Publishing Corp. will sell 50 shares at $1,000 per share certificate."

12. Mr. Alessio and Ms. Pollock conducted a proper undercover investigation which would not have induced a reasonable person without a predisposition to violate the New Mexico Securities Act of 1986 ("the Act") to do so.

13. At the time that the Respondent offered the shares to Mr. Alessio, he was not licensed as a broker-dealer, sales representative or investment adviser in the state of New Mexico.

14. At the time that the Respondent offered the shares to Mr. Alessio, the shares were not registered as securities in the state of New Mexico nor exempt under the Act.

Based upon the foregoing findings of fact, the Director hereby makes the following

## CONCLUSIONS OF LAW

1. The shares which Respondent offered in All States Publishing were securities within the meaning of Section 58-13B-2(V) of the Act.

2. The Respondent violated Section 58-13B-20 of the Act by offering to sell securities which were neither registered nor exempt under the Act.

3. The Respondent violated Section 58-13B-3(A) of the Act by offering to sell securities as an unlicensed sales representative.

4. The Division did not sustain their burden of proof in showing that Respondent's conduct violated Section 58-13B-5 of the Act by acting as an unlicensed investment adviser.

5. Given these violations, it is in the public interest and consistent with the purposes of the Act to enter a final order.

## DISCUSSION

It is well settled law that selling unregistered non-exempt securities as an unlicensed sales representative within New Mexico are per se violations of the Act.

Mr. Jenkins offered several arguments in his defense. First, Mr. Jenkins claimed that he had been unfairly targeted for investigation by lawyers in the Division because of the subject matter

of his book, Dracula In Charge of the Bloodbank: An Expose of the American Judicial System. At the hearing, Mr. Jenkins offered no evidence to refute the fact that his advertisement, which did not mention the title or subject matter of the book, triggered the Division's investigation. Nor did Mr. Jenkins present any evidence that would indicate that the Division was pursuing him for such improper motives. Second, Mr. Jenkins claimed that the Division acted in an unreasonable and outrageous manner by conducting an undercover operation against him. Mr. Jenkins did not present any credible evidence at the hearing which demonstrated unreasonable or improper conduct on the part of Mr. Alessio or Ms. Pollock in discharging their investigatory duties. Mr. Alessio and Ms. Pollock did not engage in any conduct which would have induced a reasonable person without a predisposition to violate the Act to do so. Third, Mr. Jenkins testified that he had reviewed the Act before placing his advertisement and believed that the shares were exempt from the Act's registration requirements under Section 58-13B-27(A) providing an exemption for an isolated non-issuer transaction. Under Section 58-13B-28(B) of the Act, the burden of proving an exemption falls upon the person claiming the exemption. Mr. Jenkins did not meet this evidentiary burden at hearing.

IT IS THEREFORE ORDERED THAT:

1. The Respondent shall cease and desist soliciting, offering and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and

2. The Respondent shall within thirty days of the receipt of this order pay a total civil penalty in the amount of $2,000.00 pursuant to Section 58-13B-37 of the Act.

ENTERED AT Santa Fe, New Mexico this 9th day of August, 1994.

/s/ Nancy M. Smith
Nancy M. Smith, Director
New Mexico Securities Division

IN THE NEW MEXICO COURT OF APPEALS

STATE OF NEW MEXICO
SECURITIES DIVISION

Plaintiff

N.M. State Securities Division
Order No. 94-93-064-125 (FO)

SAM S. JENKINS, SR

Appeals Ct. No. 15,836

Respondent

## DOCKETING STATEMENT

COMES NOW SAM S. JENKINS, SR., pro se and files this Docketing Statement of appeal as follows;


1. Nature of Proceding ..... 2
2. Judgement and Order Sought For Review ..... 2
3. Statement of the Case ..... 2-3
4. Statement of the Issues on Appeal ..... 3-4
5. Record of Procedings ..... 4
6. Table of Authorities ..... 5


Submitted By

*/s/ Sam Jenkins, Sr.*

Sam Jenkins, Sr., pro se
POB 21032
Albquuerque, N.M. 87154
Telephone 505-821-7522


I certify that a true copy of the foregoing was mailed this 31 day of October, 1994 to parties of record.
*/s/ Sam Jenkins, Sr.*
Sam S. Jenkins, Sr.

## NATURE OF PROCEDING

This case arises out of an Administrative Law Order and Sanctions by the State of New Mexico, Securities Division against Sam S. Jenkins, Sr., Respondent, for alleged violations of the New Mexico Securities Act of 1986, Section 58-13B-2 (V), 58-13b-20 and 58-13B-3 (A). Respondent allegedly violated the act in running a classified ad offering for sale an interest in a current non-fiction book which Respondent was writing and later published.

## JUDGEMENT AND ORDER SOUGHT FOR REVIEW

ORDER from the New Mexico Securities Division against Respondent entered on the 9th day of August, 1994.

## STATEMENT OF THE CASE

The case was initiated by the New Mexico Securities Division after insertion of a classified ad by Respondent offering to sell an interest in a current non-fiction book which Respondent was writing. An undercover agent of the NMSD made a telephone call to Respondent asking about the book, the title and substance of the book, the investment, etc.. After telling the caller the book was about the

American Judicial System and the dominant lawyer culture in America, the NMSD headed by a lawyer, then sent in two undercover agents (one a lawyer) to investigate the offer and gain information on the book and the offer to sell an interest in the book. No sale or shares of interest in the book were made to anyone as a result of the classified ad. In fact Respondent withdrew his offer to sell any shares as other financial arrangements were made to publish the book. Ninty days after the undercover agents visit, the Securities Division filed a complaint against Respondent based upon mis-statements of the undercover agents. As stated in Respondent's Petition for Review the entire action by the New Mexico Securities Division had no merit in law and represented no more than a ludicrous "lawyer harrassment and lawyer inducement"

## STATEMENT OF ISSUES ON APPEAL

POINT 1 - The Order or Judgement is not supported by law or evidence presented in testimony at the hearing. Evidence in the case under the statutes does not support any violations charged in the complaint. Respondent did not violate Section

58-13B-20 by an offering that was exempt under the act. The Securities Act. does not require licensing and registration of anyone making an offering exempt under the act. Respondent therefore did not violate Section 58-13B-3 (A) as alleged.

POINT 2 - Description of securities transactions repeatedly refer to sales. The offering was withdrawn and no sales resulted.

POINT 3 - The hearing officer in this case was the supervisor of a lawyer in the Attorney Generals office who had previously fraudulently targeted and harrassed the Respondent in an unrelated case. A clear conflict of interest.

POINT 4 - Agents in the Securities Division resorted to gross mis-statements and deception to justify bringing the charges against Respondent. Compare complaint and agents testimony of record in the hearing.

POINT 5 - The conclusions of law given by the NMSD in their final order are erroneous and contain mis-statements. The transaction charged by the NMSD is "exempt" as a unique "Isolated" transaction occuring alone or once, "not to recur".

See table of authorities.

POINT 6 - The Discussion offered as facts in the NMSD Order is erroneous and contain mis-statements. See Respondents Petition for Review at page 3, paragraph 8.

POINT 7 - Respondent has been the target of political persecution under the guise of judicial prosecution. Respondent should be reimbursed for his time, travel and expense. The NMSD should be sanctioned for their disguised acts of political persecution toward Respondent. See Respondents Petition for Review at page 4, paragraph B (6) and paragraph C.

## RECORD OF PROCEDINGS

The procedings of the hearing conducted by the NMSD were tape recorded and are available to support the issues raised in thisf appeal.

## TABLE OF AUTHORITIES

N.M. Statutes 58-13B-27 (A) Exempt Transactions

"An Isolated non-issuer transaction is exempt, whether or not effected through a broker-dealer."

White v. Solomon, 105 N.M. 366, 732 P.2d 1389

"For the Securities act to apply, the transactions must have some tangible connection to one another, more than just the same seller."

Ersted v. Hobart Howry Co., et al. 209 N.W. 66 SC of So. Dakota

"An isolated transaction is a transaction not made in course of repeated and successive sales of a similiar nature."

COURT OF APPEALS OF NEW MEXICO
FILED
OCT 21 1995
/s/Patricia R. Wallace

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO SECURITIES DIVISION,**

**plaintiff -Appellee,**

**No. 15,836**

**vs.**

**SAM S. JENKINS SR.,**

**Respondent-Appellant.**

_____/

**ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED**

This matter having come before this Court on its own motion, and it appearing that:

1. On September 8, 1994, Appellant, Sam S. Jenkins Sr. appearing pro se filed a Petition for Review pursuant to NMSA 1978, Section 58-13B-56 (Repl.Pamp. 1991).

2. The Rules of Appellate Procedure provide that, to the

extent of any conflict, SCRA 1986, 12-601 (Repl. 1992) supersedes any statute providing for the time or other procedure for filing or perfecting an appeal with this Court. SCRA 12-601(B) provides that direct appeals from orders of administrative agencies shall be taken by:

> "filing a notice of appeal with the appellate clerk, together with the docket fee and proof of service thereof on the agency involved and all parties in accordance with Rule 12-307 within thirty (30) days from the date of the order, decision or action appealed from. Thereafter, within thirty (30) days of the filing of the notice of appeal or complaint on appeal, the appellant shall file a docketing statement in accordance with Rule 12-208 and the appeal shall thereafter proceed in accordance with these rules, notwithstanding any provision of law to the contrary."

3. We treat Appellant's Petition for Review as a Notice of Appeal. We note that Appellant has failed to attach a copy of the order appealed from with the Petition for Review and direct him to do so if he pursues this appeal. See SCRA 1986, 12-202 (B) (Repl. 1992).

4. As of the date of this Order, Appellant has failed to file a Docketing Statement. SCRA 1986, 12-601(A) and (B), 12-208, 12-

312(A) (Repl. 1992). The Docketing Statement should have been filed within thirty (30) days from the filing of the Petition of Review on September 8, 1994, or on or before October 11, 1994. To the extent the Petition for Review could be construed as a Docketing Statement, it fails to comply with SCRA 12-208 (B) (3), - (4), -(5), and -(6).

**IT IS THEREFORE ORDERED** that Sam S. Jenkins Sr. shall show cause in writing why this appeal should not be dismissed for failure to timely file a Docketing Statement. Mr. Jenkins' written response shall be filed with the Clerk of this Court no later than two (2) weeks from the date stamped on this Order to Show Cause. Mr. Jenkins shall also file a Docketing Statement that conforms with SCRA 12-208 within two (2) weeks from the date stamped on this Order. If no written response and no Docketing Statement are filed within two (2) weeks from the date stamped on this Order, this Court shall dismiss Appellant's appeal.

*/s/Joseph Alarid*
Judge